UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of :

AMERICAN ELECTRIC POWER AND

ITS SUBSIDIARIES APPALACHIAN

POWER COMPANY, INDIANA :

MICHIGAN POWER COMPANY,

KENTUCKY POWER COMPANY,

KINGSPORT POWER COMPANY,

OHIO POWER COMPANY, PUBLIC : CASE 9-CA-095384

SERVICE COMPANY OF OKLAHOMA,

AND SOUTHWESTERN ELECTRIC

POWER COMPANY

:

and

:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, SYSTEM COUNCIL U-9 AND LOCALS 329, 386, 696, 738, 876, 934, 978, 1002,

1392, AND 1466, AFL-CIO

REPLY BRIEF IN RESPONSE TO THE ANSWERING BRIEFS OF THE COUNSEL FOR THE ACTING GENERAL COUNSEL AND THE CHARGING PARTIES AND IN SUPPORT OF RESPONDENTS' EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

I. INTRODUCTION

The Administrative Law Judge's (ALJ) Decision and the positions of Counsel for the Acting General Counsel and the Charging Parties (the "Union") are premised upon the illogical notion that because Respondents had never eliminated health insurance benefits for a class of employees in the past, they were not entitled to do so in the instant case, despite an extensive history of past practices which included uncontested, unilateral changes and eliminations to Respondents' benefits plans over the course of thirty years of dealing between the IBEW and

Respondents.

This position does not comport with the law or the realities of today's workplace. Allowing the ALJ's decision to stand will effectively hamstring employers like AEP with multiple bargaining units nationwide with over 50 collective bargaining agreements to negotiate all benefits plans, changes to those plans, and eliminations of benefits, for each and every collective bargaining agreement individually. The effect would be to require an employer such as AEP, which has over 18,000 employees, recognizes 5 different major labor unions and has over 50 collective bargaining agreements, to bargain with each union over each and every change made to any of the employee benefit plans, notwithstanding that the benefit plans apply to virtually all of AEP's 18,000 employees. The ALJ's decision will compel employers to freeze benefits plans as contracts expire and successor agreements are not immediately concluded creating a checkerboard of plans throughout multiple bargaining units—all of this in spite of the fact that the unions agreed to be bound by plan conditions. Any employer that decides to maintain system-wide benefits in place faces the struggle of reopening bargaining of benefits each and every year, not to mention the real possibility of one union holding up benefits changes for an entire employee population of both unionized and non-unionized employees.

Far from being limited to only to the elimination of the particular benefit at issue in this case, the ALJ's decision has a much larger and problematic impact: It removes an employer's ability to efficiently manage its benefits through system-wide benefits plans applicable to all employees. In an age when employers are asked to shoulder increasing costs and regulation of health insurance benefits (and the fact that many employers are now required by law to provide such benefits to their employees), it makes no sense to eliminate one of the few, if in fact the *only*, efficiencies employers have to manage today's morass of health insurance obligations and

costs. Employees also benefit from the efficiencies gained in the form of lower premiums and more robust benefits offerings. Eliminating this efficiency creates perverse incentives for employers, such as, for example, eliminating the option of certain benefits for employees altogether, shifting more and more costs to employees, or moving the selection, management, and details of benefits plans to representative unions. These are outcomes that none of the parties seriously want here.

Of course, Respondents do not argue that the employer's discretion in making benefit plan changes is uncontrolled. The "check" on the employers' discretion is that it is "obligated under its past practice to 'treat the [union] employees exactly the same as [the non-union] employees'..." *E.I. du Pont de Nemours & Co. v. NLRB*, 682 F.3d 65, 68 (D.C. Cir. 2010) (quoting *Courier-Journal*, 342 NLRB 1093, 1094 (2010)). It is undisputed that AEP's past practice in implementing its benefits plans is consistent with these obligations, and thus did not violate the National Labor Relations Act (the "Act").

II. ARGUMENT

A. AEP Maintained the Status Quo Under Its Past Practices and Master CBA Participation Clause When It Unilaterally Eliminated Retiree Medical Benefits For Post-January 1, 2014 Hires Represented by the IBEW

The past practice established over thirty years of dealing between AEP and the IBEW allowed AEP to eliminate retiree medical benefits for individuals hired after January 1, 2014. This past practice consisted of the following:

• Bargained-for "Participation Clauses" in collective bargaining agreements: The

Union consistently bargained for and agreed to its members' participation in AEP's

system-wide benefits in a consistent succession of collective bargaining agreements.

When the Union agreed to this, AEP's plans included "reservation of rights" language—

of which the Union was aware—reserving to AEP the right to modify or eliminate its

medical benefits and other plans, at any time, for any reason, including those benefits provided to retirees.

- Over the parties' thirty-year bargaining history, the Union acceded to all changes, reductions, and eliminations AEP made to its system-wide benefits, including elimination of life insurance benefits for retirees, increases to medical plan deductibles, increases to employee contributions to medical insurance coverage, and institution of spousal and domestic partner surcharges for medical plan coverage. AEP's uncontested, unbargained-for changes included both "programmatic" and significantly more substantive changes, none of which were seriously challenged by the Union.
- AEP's consistent rejection of the Union's attempts to bargain benefits plans:

 Attempts by the Union to negotiate individual benefits plans were universally rejected by AEP. Following these attempts, the Union without exception agreed to participate in AEP's system-wide benefits, under the terms those benefits were provided to all AEP employees, union and non-union alike.
- Consistent treatment of union and non-union employees: In the thirty-year period preceding this Charge and Complaint and to the present date, employees represented by the Union and non-union employees received the same set of system-wide benefits, subject to changes, eliminations, and reductions affecting all employees regardless of their membership in a bargaining unit. For each unilateral change, AEP announced and implemented its changes at the same time with respect to all employees and all retirees who participate in AEP's system-wide benefits.

Respondents' Brief in Support of their Exceptions at p.8 and Respondents' Exhibit 28 lists additional examples where AEP reduced or eliminated benefits for all employees, union and non-union alike.

None of these aspects of the parties' past practice were a secret to the Union. The Union was fully aware of AEP's ability to eliminate benefits plans under the "reservation of rights" language in the plans. (Tr. 38-39). The Union thus bargained for the outcome here when it agreed that its members would participate in AEP's system-wide benefits. The Union was also aware of each and every unilateral change AEP made over the years, and did not contest those changes.

The arguments set forth in the responsive briefs of the Charging Parties and Counsel for the Acting General Counsel do nothing to refute the parties' established past practices. For example, the Answering Brief of the Charging Parties disagrees that AEP consistently rejected the Union's attempts to bargain individual benefits plans. (Answering Brief of Charging Parties at pp. 7-11). Nevertheless, the fact remains that the outcome of those discussions (whether they were "bargaining" or not) always resulted in the Union's participation in AEP's Comprehensive Medical Plans without any exceptions to those plans' terms, including the plans' "reservation of rights" language.

Both answering briefs also argue that elimination of a benefit was beyond the scope of AEP's past changes. (Answering Brief of Charging Parties at pp. 11-14; Answering Brief of Counsel for the Acting General Counsel at pp. 10-11). Of course, this is factually incorrect considering AEP's robust history of substantive changes to its plans, including elimination of certain benefits. And, to reiterate the key point that the Union got what it bargained for, the "scope" of AEP's past changes is immaterial when the Union agreed to participate in AEP's plans, when participation on those plans were subject to their terms—including AEP's right to eliminate benefits unilaterally.

B. The Issue of Whether a "Sound, Arguable Basis" Existed for AEP's Actions Was Not Fully Litigated Because Respondents Had No Notice of an Alleged Section 8(d) Violation and None of the Parties Alleged or Argued Such a Violation Occurred Until the ALJ Introduced It in His Decision

"[I]t is incumbent upon the General Counsel, as prosecutor and master of the complaint, to specify with adequate clarity the nature of his accusations. It is not the Board's role to attempt to piece together theories from ambiguous complaint references and random statements during the hearing." *Baptist Hosp. of East Tenn.*, 351 NLRB 71, 74 fn.5 (2007). Yet, by finding a violation of 8(d) of the Act *sua sponte*, the ALJ's decision endorses the absurd notion that Respondents were obligated to parse the Complaint and hearing proceedings to determine all possible violations not specifically alleged or briefed by opposing counsel.

Review of the parties' post-hearing briefs in this matter support that none of the parties argued or litigated the issue of an 8(d) violation. That Counsel for the Acting General Counsel has now joined the bandwagon alleging an 8(d) violation after the fact does not excuse his failure to provide sufficient notice to AEP at the initial and post-hearing stages of this matter.

The ALJ's finding is particularly problematic considering the differing standards and remedies for unilateral changes under 8(a)(5) and contract modifications under 8(d). See Bath Iron Works, 345 NLRB 499, 502, 503 (2005), aff'd sub nom., Bath Marine Draftsmen's Ass'n v. NLRB, 475 F.3d 14 (1st Cir. 2007) (noting the 8(d) standard requires that the General Counsel prove whether the contract forbade the conduct, while 8(a)(5) cases raise an issue of whether the contract privileges the conduct, and further, stating the remedies for 8(d) violations are more "severe"). Had AEP been on notice that the ALJ would extract such an allegation from a Complaint that never alleged it in the first place, AEP would have addressed the issue in its witnesses' testimony or provided arguments against such a violation in its post-hearing brief. The fact that none of the parties' post-hearing briefs even address an 8(d) violation or applied

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8(d)'s standards or remedies to the facts of this case is reason enough to disregard the ALJ's clearly erroneous finding on this point. See Baptist Hosp. of East Tenn., 351 NLRB at 74 fn.5 (finding no 8(d) violation, in part, because Counsel for the General Counsel concluded his brief with the "formal statement" of his theory of his case alleging only 8(a)(5) violations), see also Counsel for the Acting General Counsel's Brief to the Administrative Law Judge at 19 (Conclusion stating that "[b]ased on the foregoing, and the record as a whole, the General Counsel submits that Respondent [sic] violated Section 8(a)(1) and (5) of the Act when it modified an existing collective-bargaining agreement . . .").

In any case, AEP had a "sound, arguable basis" for its elimination of retiree medical benefits for the reasons stated in its Brief in Support of Exceptions and this brief. "Where an employer has a 'sound arguable basis' for its interpretation of a contract and is not 'motivated by union animus or . . . acting in bad faith,' the Board ordinarily will not find a violation." *Bath Iron Works*, 345 NLRB at 502 (quoting *NCR Corp.*, 271 NLRB 1212, 1213 (1984)). Further, if both parties interpretations of the contract are reasonable, no 8(d) violation exists. *Id.* at 503.

Neither the Counsel for the Acting General Counsel nor the Union has presented *any* evidence of bad faith by AEP. Far from acting with the requisite bad faith, AEP had a morethan-reasonable basis for its actions under the collective bargaining agreement. The Union agreed to participate in AEP's system-wide benefits plans, which included terms reserving to AEP the right to unilaterally eliminate benefits. And the past practices established under the agreement reasonably supported AEP's actions. As a result, the ALJ's finding of an 8(d) violation was a clear error.

VI. CONCLUSION

For all the foregoing reasons, and for the reasons stated in the Brief in Support of Respondents' Exceptions to the Decision of the Administrative Law Judge, Respondents

respectfully request that the ALJ's decision be reversed in its entirety and the Complaint against them dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of November, 2013, I served the attached Reply Brief In Response to the Answering Briefs of the Counsel for the Acting General Counsel and the Charging Parties and In Support of Respondents' Exceptions to the Administrative Law Judge's Decision on all parties by electronic mail to the following addresses:

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